(12)

No. 86-684

In The

Supreme Court of the United States

October Term, 1987

CALIFORNIA,

v. *Petitioner,*

BILLY GREENWOOD and DIANE VAN HOUTEN,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

RESPONDENT'S REQUEST FOR LEAVE TO FILE POST-ARGUMENT SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES–(Continued)

TABLE OF AUTHORITIES–(Continued)

REQUEST FOR LEAVE TO FILE POST-ARGUMENT SUPPLEMENTAL MEMORANDUM.

Respondent Billy Greenwood hereby requests leave of this Honorable Court to file a post-argument supplemental memorandum, which is lodged herewith.

The supplemental memorandum addresses the various reasons why this Court should resolve the merits of Respondent's due process issue.

This memorandum is so submitted because the issue as to whether or not the due process claim was properly before the Court was not squarely posed until oral argument, in the questions posed by the Honorable Chief Justice, and by the Honorable Justice O'Connor. In its Reply Brief, Petitioner had made only a passing reference to the nature of the arguments below (PRB 1), had not specifically raised any procedural bar, had not requested this Court not to address the merits of the issue, and had cited neither the rule in *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985),[1] nor any other case for the proposition that the issue was not properly before the Court. Instead, Petitioner briefed the merits of the issue. (PRB 1-2).

It is herein contended that the procedural issue, discussed at oral argument, is thus one to which Respondent did not have an adequate opportunity to respond.

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[1] To this writer's recollection, the first mention of the rule in *Tuttle* in this case was by the Honorable Chief Justice at oral argument.

For the foregoing reasons, Respondent requests leave to file the Supplemental Memorandum.

Dated: February 10, 1988

Respectfully submitted,

/s/ MICHAEL IAN GAREY
Attorney for Respondent
Billy Greenwood

SUPPLEMENTAL MEMORANDUM

I.

SHOULD THIS COURT REVIEW RESPONDENT'S DUE PROCESS CONTENTION?

Respondent Billy Greenwood, in his brief on the Merits, raised two related additional arguments in support of the judgment below. The first of these (R.B.15-20) suggests that, in Fourth Amendment analysis, state law must be considered in determining the reasonableness of a citizen's expectation of privacy. The second argument in support of the judgment below, alleges that California Constitution, Article I, §28(d) violates the Due Process Clause of the Fourteenth Amendment in that it effectively removes any effective deterrent to violations of the substantively unchanged rights of privacy protected under California Constitution, Article I, §§1, 13.

At oral argument, Justice O'Connor and Chief Justice Rehnquist raised questions as to whether or not this issue was properly before the Court, on the theory that such an issue should have been raised in a brief in opposition to the Petition for Certiorari. As this procedural point was not squarely raised in Petitioner's Reply Brief (P.R.B. 1), Respondent requests this opportunity to adequately respond.

During argument, Chief Justice Rehnquist mentioned the case of "Tuttle". Assuming that case to have been *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), it is most respectfully submitted that the case is inapposite. In *Tuttle*, Respondent asserted for the first time in his brief on the merits, that Petitioner's objection at the trial court level was inadequate to preserve the very

issue that the Court had granted Certiorari to review. Respondent's claim would, in essence, have vitiated the original grant of Certiorari. This Court exercised its discretion to decide the merits of Petitioner's issue, since the non-jurisdictional defect urged by Respondent came too late. Much of the basis for this Court's exercise of its discretion in *Tuttle* is self-evident in the following passage:

> But we do not think that judicial economy is served by invoking the Rule at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived. Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it. Cf. On *Lee v. United States,* 343 U.S. 747, 749-750, n 3, 96 L.Ed. 1270, 72 S.Ct. 967 (1952). *Oklahoma City v. Tuttle, supra,* 471 U.S. at 815-816.

(See also, *Weiner v. United States,* 357 U.S. 349, 351, fn. 1 (1958).)

The purpose of the rule cited in *Tuttle* stems largely from the notion that if a respondent has any reason why review by this Court should not occur, the point should be made *before* this Court makes the decision to grant or deny review.

Unlike the situation in *Tuttle,* neither of Respondent's contentions would vitiate review by this Court.

The first of these related contentions merely adds another facet to the determination of what constitutes a reasonable expectation of privacy. The second, dealing with the impact of Due Process on California Constitution, Article I, §28(d), does not assert that no federal question is posed in this case; on the contrary, it asserts that *two* federal questions, rather than one, should be addressed to properly resolve the issues in this case.

And in this context, it bears some emphasis that in *Tuttle* and *Wiener,* the rule was invoked to deny a procedural bar to review on the merits of an issue; Respondent herein does not seek to bar review on the merits. Appropriate herein is the dissenting opinion of Justice Stevens in *E.E.O.C. v. F.L.R.A.*, 476 U.S. ___ [90 L.Ed.2d 19, 25, 106 S.Ct. ___] (1986):

> In my opinion the Court should decide the merits of this case. Two federal agencies disagree about the meaning of an important federal statute; it would serve the interests of both to have the disagreement resolved as promptly as possible. To this end, neither agency has suggested that the arguments advanced by the other are not properly before the Court. Since we are now fully advised about the merits, it would be most efficient for us to resolve the issue now rather than to postpone decision until another similar case works its way up through the agency and the Court of Appeals. (Footnote omitted.)

Moreover, in this case, Respondent seeks only to raise a point, related to the merits, in support of the judgment below. (See, *Marshall v. Pletz,* 317 U.S 383, 390 (1943).)

Further, to the extent that the decision in *Tuttle* is one involving the discretion of this Court as to the

scope of its review, it is respectfully submitted that this Court should exercise its discretion to review the merits of Respondent's Due Process argument. Clearly this court has such discretion, even had the issue not been raised below, which in fact, it had,[1] and especially when the issue is one of pure law, involving no factual issues not developed below. (See, *Singleton v. Wulff,* 428 U.S. 106, 120-121 (1976); see and compare, *Steagald v. United States,* 451 U.S. 204, 209-211 (1981).)

Particularly this is so, where the procedural posture of the case is such that the interest of judicial

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[1] In fact, Respondent repeatedly referred to the obvious violation of state law involved in the trash searches at the Municipal Court level (C.T. 14,30,32,34), in the Superior Court (R.T. 16), and in his brief in the Court of Appeals (J.A. 21, 24). Petitioner's reference to Respondent's argument below is taken out of context. The Fourth Amendment privacy issue was introduced at the Municipal Court as a point of emphasis, not as an exclusive argument. (C.T. 14-16) In the Municipal Court, Respondent also first reserved, and tersely mentioned the potential invalidity of Article I, §28(d). (C.T. 15,17,35) And in the Superior Court, in arguing for the judgment of which Petitioner now seeks review, Respondent specifically argued that he did not waive California Constitution, Article I, § 13, and that Article I, §28(d) was violative of the principles laid down by this Court in *Mapp v. Ohio,* 367 U.S. 643 (1961). (R.T. 16). That Respondent, in the lower courts, placed greater emphasis on the impact of *stare decisis* on the issues herein, is neither surprising in view of the binding nature of *People v. Krivda,* 5 Cal.3d 357 (1971) and *People v. Krivda,* 8 Cal.3d 623 (1973), which Petitioner conceded in the Court of Appeals, *People v. Greenwood,* 182 Cal.App.3d 729, 734 (1986), nor should such emphasis preclude plenary review in this Court. (See, e.g. *Mapp v. Ohio, supra,* 367 U.S. at 671, concurring opinion by Justice Douglas.)

economy, central to the decision in *Tuttle,* mitigates in favor of prompt review by this Court. (See, *E.E.O.C. v. F.L.R.A., supra,* 476 U.S. at ___, 90 L.Ed.2d at 25, dissenting opinion by Justice Stevens; *Bowen v. American Hospital Assn.,* 476 U.S. at ___ [90 L.Ed.2d 584, 599, fn. 14; 106 S.Ct. ___] (1986).) In the present case, both the procedural posture of this case and the nature of the Due Process issue itself mitigate strongly in favor of review on the merits.

First, because this matter reaches this Court as a review of a motion pursuant to California Penal Code §995, no ruling by this Court will finally determine the search issues; should this Court rule adverse to Respondent, the ruling would be substantial precedent, but would not bar further litigation.

Penal Code §995 provides a procedural device for reviewing the decision of a magistrate in sending a case to Superior Court for trial. Search issues are cognizable in the context of such a motion, because only competent evidence may support the magistrate's decision. (See, *Badillo v. Superior Court,* 46 Cal.2d 269, 271 (1956).) However, a dismissal purusant to P.C. §995 does not evoke the doctrines of collateral estoppel, or res judicata, and is no bar to further prosecution (*People v. Uhlemann,* 9 Cal.3d 662 (1973)), nor does the affirmance of such a dismissal on appeal bar reprosecution (*Anthony v. Superior Court,* 109 Cal.App. 346 (1980).)

Under California law, the converse is also true. When a motion pursuant to P.C. §995 is denied (which would be the effect of this Court's ruling were it to hold

for Petitioner), a defendant is entitled to a *de novo* motion to suppress pursuant to P.C. §1538.5(i).[2]

As applicable to this case, former P.C. §1538.5(i) provides a *de novo* hearing, at which the rulings of the magistrate at the preliminary hearing are of *no effect*. See, *People v. Baldwin*, 62 Cal.App.3d 727, 732, fn. 3 (1976); *People v. Cagle*, 21 Cal.App.3d 57, 60 (1971). As noted, ante, fn. 3, even under the new procedure, which

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[2] While this case has been on review, §1538.5(i) has been amended to provide that if an evidentiary hearing is held on a motion to suppress at the preliminary hearing, the defense is not entitled to a second *evidentiary* hearing in the Superior Court. (Stats. 1987, C. 828, §99). Since Respondent's decision to litigate the search at the Municipal Court level preceeded the amendment, and no intelligent election was thus made, it is doubtful that the amendment is applicable. (See *Martinez v. Superior Court*, 106 Cal.App.3d 975, 981 (1980), see also *People v. Hobbs*, 192 Cal.3d 959 (1987), Mod. at 193 Cal.App.3d 560a fn.3.) Moreover, even under amended §1538.5, Respondent would merely be precluded from a second evidentiary hearing. Former P.C. §1538.5(i) provided in part:

> (i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing.

is inapplicable to this case, no bar would exist to prevent Respondent from raising the Due Process argument as to the §1538.5 motion.

Thus, were this Court to decline to review the Due Process argument, and if this Court were to rule against Respondent, Respondent could raise the Due Process claim in the *de novo* motion to suppress. Either side could, and most certainly would, seek review from an adverse ruling, and the matter would work its way up through the judicial system towards an inevitable petition for review by this Court.

Considerations of judicial economy thus mitigate strongly in favor of review at this time.

Finally, the nature of the Due Process issue itself suggests the wisdom of its review at this time, for the issue presents a substantial federal question.

As Respondent has noted in his brief on the merits (R.B. 17-23), California Constitution, Article I, §28(d), does not alter the substantive rights, or zones of privacy, protected pursuant to California Constitution, Article I, §§ 1, 13. (*In re Lance W.*, 37 Cal.3d 873, 886 (1985).) Article I, §§ 1, 13, have long been construed to have a vitality independent of analogous provisions of the Fourth and Fourteenth Amendments to the United States Constitution, and to provide greater protection than that provided pursuant to the Federal Constitution; California continues to recognize the independent force of its own Constitution. (*People v. Mayoff*, 42 Cal.3d 1302, 1312 (1986).)

However, because of the effect of California Constitution, Article I, §28(d), California may no longer employ what this court noted in *Mapp v. Ohio, supra,* is the only effective deterrent to violations of citizens' reasonable expectation of privacy.

It is respectfully submitted that no state, consistent with Federal Due Process, may recognize a zone of privacy as a function of its State Constitution, and deny the only effective deterrent to its violation.

This Court in the past has recognized that the Due Process Clause protects rights or liberty interests that have their origin in state law. (*Vitek v. Jones,* 445 U.S. 480, 488 (1980); *Hewitt v. Helms,* 459 U.S. 460, 466 (1983).) And this protection is not limited to questions of mere pre-deprivation procedures. As noted in Justice Blackmun's concurring opinion in *Parratt v. Taylor,* 451 U.S. 527, 545 (1981):

> I also do not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity. I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protections, are, in and of themselves, antithetical to fundamental notions of due process. See, e.g., *Boddie v. Connecticut,* 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971); *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973).

For a state to define a zone of privacy, and to thereafter deny the only effective procedural deterrent to its deliberate violation by state agents, is to grant a right and provide no effective procedural protection of the right whatsoever. A right of privacy guaranteed by state law is a fundamental liberty interest which

deserves the protection of the Due Process Clause. To hold otherwise is to allow a state to recognize a right of privacy, but to fail to deter the state's own agents from deliberately violating that right, and to use the fruits of that violation to convict a man of crime, and to deprive him of his liberty. Such is a governmental action fundamentally antithetical to notions of due process.

Nor do this Court's holdings in *New Jersey v. T.L.O.*, 469 U.S. 325, 344, fn. 10 (1985), *Cooper v. California*, 386 U.S. 58, 61 (1967), or *Rakas v. Illinois*, 439 U.S. 128, 143 fn. 12 (1978), dictate a contrary result. None of those cases squarely faced the issue presented herein.

Certainly decisions of this Court have recognized that the states may interpret their own constitutions as providing greater privacy rights than those recognized under the Federal Constitution. (*New Jersey v. T.L.O., supra*, 469 U.S. at 344 fn. 10; *Cooper v. California, supra*, 386 U.S. at 61; see also, *Michigan v. Long*, 463 U.S. 1032 (1983).) In each of those cases, however, it was assumed that the state could, if it so desired, provide a remedy of exclusion of evidence if a zone of privacy recognized under state law was violated. None of those cases had occasion to pass on the validity, as a matter of federal due process, of a state granting a right and *entirely* withholding the only effective deterrent to its violation, thus allowing the state's own agents carte blanche to violate the right of privacy guaranteed under state law.

It is true, that in *Cooper v. California, supra*, this Court observed, in *obiter dicta*, that no federal question would be posed in the state's choice of a harmless error

rule applicable to the erroneous introduction of evidence under state law. The question was not squarely presented in *Cooper*. In that case, the state had held a search unlawful. This Court held the search lawful under Fourth Amendment standards. In *dicta*, this court noted that *if* the State held the search unlawful under state standards, no federal question would be posed. The due process issue raised herein was not ripe in *Cooper*. In any event, this Court assumed the imposition of a state exclusionary rule in *Cooper* (see *People v. Cahan*, 44 Cal.2d 434 (1955)), and had no occasion to pass on the questions herein presented.

Moreover, at oral argument, in response to a question, Respondent noted that due process is violated where the state fails to employ the exclusionary rule for violations of a fundamental zone of privacy. Whatever may be the resolution of that issue as to rules defining the scope of who may assert a violation of state law (see, *Rakas v. Illinois, supra*), or the rule to be employed in determining the impact on a trial of the erroneous introduction of evidence seized in violation of the state constitution (see *Cooper v. California, supra*), where, as here, the state recognizes a basic zone of privacy, due process must be viewed as precluding the complete deprivation of the only effective procedural protection of that zone of privacy.

Neither due process nor this Court should allow, encourage or condone deliberate violations of state law by state agents relating to recognized basic zones of privacy. (See, *United States v. Rickus* 737 F.2d 360 (3rd Cir. 1984); *United States v. Henderson* 721 F.2d 662 (9th Cir. 1983) (dicta); *United States v. Jarabek* 726 F.2d 889, 900 fn. 10 (1st Cir. 1984).

CONCLUSION

It is respectfully submitted that a substantial federal question is posed in Respondent Greenwood's due process argument, and procedural bar should not be utilized to deny resolution of the issue at this time.

Dated: February 10, 1988

Respectfully submitted,

/s/ MICHAEL IAN GAREY
Attorney for Respondent
Billy Greenwood